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**Criminal Law—Plea Bargaining—
Withdrawal of Guilty Plea.**

Robert Clancy and Lowell Stern, petitioners, were individually indicted for possession and sale of marijuana (felonious courts in West Virginia at that time). Their pleas of not guilty were changed to pleas of guilty based on a belief that the trial court would grant them probation. Instead prison sentences were handed down; both defendants moved to withdraw their pleas; but their motions were denied. Defendants petitioned for a writ of habeas corpus. The petition required the court, in an original habeas corpus proceeding, to make a factual determination of the voluntariness of the guilty pleas based on affidavits of the parties and transcripts of the proceedings in the Circuit Court of Monongalia County. The two petitions were joined for argument. *Held*: writs awarded. The court, in both cases, determined that the pleas were involuntary and that the trial judge should have permitted the withdrawal of the guilty pleas. The court also affirmed the legality of plea bargaining in criminal trials, stating that the plea agreement should be made a part of the record. *State ex rel. Clancy v. Coiner*, 179 S.E.2d 726 (W. Va. 1971).

The court in *Clancy* took a strongly subjective approach to the determination of a voluntary guilty plea. Judge Caplan, in writing the opinion of the court, stated that a defendant's guilty plea would be involuntary if entered upon a mistaken belief that a binding agreement had been made.¹ It made no difference whether this mistaken belief was induced by the prosecuting attorney, the defense counsel, or even a misunderstanding solely on the part of the defendant.² Moreover, in discussing record evidence, the court stated that the statements of the defendant that he was entering the plea voluntarily, while evidentiary on the issue, would not bar inquiry as to the voluntariness of the plea.³ The court also upheld the legality of plea bargaining,⁴ citing the administrative necessities for its

¹ *State ex rel. Clancy v. Coiner*, 179 S.E.2d 726, 731 (W. Va. 1971).

² *Id.* at 732.

³ *Id.* at 733.

⁴ Completely ignored by the court was the case of *Maloney v. Coiner*, 152 W. Va. 437, 164 S.E.2d 205 (1968). The prosecutor in that case negotiated a guilty plea in return for a plea to a lesser charge and an agreement only to include one previous offense in the information to be filed with the court (the defendant wished to avoid West Virginia's Recidivist Statute). The court allowed the plea to stand, thus impliedly upholding the legality of plea bargaining.

existence.⁵ However, to insure an adequate determination of whether a plea was voluntarily entered, the court added that the plea agreement should be made a part of the record.⁶

The guilty plea has long been a major practice in the adjudication of defendants within the American criminal justice system.⁷ Its extensive use is due primarily to plea bargaining. In West Virginia, a survey of county prosecuting attorneys showed that roughly fifty percent of all guilty pleas are negotiated pleas.⁸ This would probably be a low estimate. The survey was made a full two years before *Clancy*. Prosecuting attorneys would not be inclined to admit to an extensive use of a practice which had not received express judicial recognition.

The practice of bargaining for pleas has been both maligned and supported. A great amount of literature can be found both for and against the practice.⁹

⁵ "In this day of crowded criminal court dockets the speedy dispatch of litigation is essential if justice is to be done." 179 S.E.2d at 733.

⁶ *Id.* at 734.

⁷ Several sources indicate that as many as ninety percent of the defendants convicted plead guilty. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Hazard, *The Sequence of Criminal Prosecution*, in NATIONAL SYMPOSIUM ON SCIENCE AND CRIMINAL JUSTICE 42 (1966). Statistics in the federal courts affirm such a high percentage. In eighty-nine United States District Courts the percentage of the total defendants convicted and sentenced which were adjudicated by pleas of guilty or nolo contendere was 85% in 1968. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS table 4 (1968). (This report is published each year in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.)

⁸ The questionnaire was answered by thirty-one of fifty-five county prosecuting attorneys in West Virginia. The author of that survey arrived at a weighted average by comparing the county population with the responses from those prosecuting attorneys who answered the questionnaire. In this manner, he determined that 76.8 percent of those convicted and sentenced in West Virginia were adjudicated by guilty pleas, and that over 46 percent of those guilty pleas were negotiated. This percentage is probably somewhat below actual practice because this figure includes three prosecutors who would not admit to plea negotiation. C. Toon, *Plea Bargaining: West Virginia View and Practice Compared to New National Views* (1968) (unpublished paper presented at a Criminal Procedure Seminar at West Virginia University College of Law).

⁹ For complete discussions of the present-day practice of plea bargaining see D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). For a more critical view, see Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968). Condemnation of the process has also been proposed. See note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

However, the court in *Clancy* did not go into a lengthy discussion of the legality of the practice of plea bargaining in West Virginia trial courts. It merely recognized that present-day court congestion requires prompt disposition of criminal cases to insure that justice is done.¹⁰ *Brady v. United States*¹¹ was relied on by *Clancy* as the principal authority for the legality of plea bargaining. Brady had been indicted for kidnapping in violation of a federal statute. He originally pleaded not guilty, but changed his plea to guilty after learning that a co-defendant had confessed and would testify against him. He entered the plea to avoid the death penalty which by statute could only be imposed by recommendation of a jury. The defendant's guilty plea was upheld as a voluntary and proper plea and relief was denied. The Supreme Court accepted the process of bargaining for pleas between the defendant and the state.¹² However, for this bargaining process to be proper, the Court has held that the plea must withstand the test of whether it was a voluntary and knowing choice among the alternatives available to the defendant.¹³ Therefore, in accepting a guilty plea, a trial judge must be sure that the defendant's plea is voluntarily and intelligently made.

To insure that the plea meets these requirements, the court in *Clancy* further stated that the bargain itself should be made a part of the record.¹⁴ By requiring that it be open and recorded, the practice of plea bargaining attains the dignity of a judicial procedure, and it becomes subject to public scrutiny and appellate review.¹⁵ Though the court stated that plea bargaining should be made a part of the record,¹⁶ it is presumed that this refers to the bargain itself,

¹⁰ "In this day of crowded criminal court dockets the speedy dispatch of litigation is essential if justice is to be done." 179 S.E.2d at 733.

¹¹ 397 U.S. 742 (1970).

¹² *Id.* at 753.

¹³ This was the interpretation of *Brady* which the Supreme Court gave in a later opinion. The test is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

¹⁴ 179 S.E.2d at 734.

¹⁵ *Bailey v. MacDougall*, 392 F.2d 155 (4th Cir. 1968); *Smith v. United States*, 277 F. Supp. 850 (D. Md. 1967). Requiring the inclusion of the plea bargain in the record appears to be a growing trend. See *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969) (a full and complete disclosure of the negotiations should be made a part of the record); *People v. West*, 3 Cal. 3d 253, 91 Cal. Rptr. 385, 477 P.2d 409 (1970) (a bargained plea should be recorded); *Hamm v. State*, 123 Ga. App. 10, 179 S.E.2d 272 (1970) (plea bargaining should appear in the record); *Austin v. State*, 49 Wis. 2d 727, 183 N.W.2d 56 (1971) (plea agreement should be made of record).

¹⁶ 179 S.E.2d at 734.

and not the bargaining process. The bargain alone would be sufficient information for review.

The requirement that the bargain be recorded is somewhat different from the proposal made by the American Bar Association. In its *Standards Relating to Pleas of Guilty*, the ABA has recommended that where a plea agreement has been reached, the judge may make the agreement part of the record if the parties request that this be done.¹⁷ Thus, the recording of the agreement is not only discretionary with the trial judge, but it must also be requested by both parties. It should be noted that these standards were presented as minimum standards. The court in *Clancy* has merely endorsed a higher standard.

The withdrawal of a guilty plea in West Virginia is allowed only at the discretion of the trial judge. Depriving the court of this discretion will come only upon a showing that the defendant entered his plea under some mistake, misapprehension, promise or inducement which has worked an injustice.¹⁸ In the federal courts the guilty plea may be withdrawn at anytime before the sentence is imposed. After sentencing, the court may permit the accused to withdraw his plea to correct a manifest injustice,¹⁹ but this occurs only in extraordinary cases.²⁰ The court in *Clancy* accepted the federal view of allowing withdrawal of a guilty plea even after sentencing. For this reason, the court permitted the withdrawal of the guilty pleas because it believed an injustice had occurred.

In deciding whether a plea was entered voluntarily, the court in *Clancy* proposed a subjective process called the "totality of circumstances test."²¹ This test is basically an interpretation of the facts

¹⁷ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3 (Tent. Draft 1967) (approved by ABA House of Delegates, February 1968).

¹⁸ *State v. Stevenson*, 67 W. Va. 553, 68 S.E. 286 (1910). This point seems well established in West Virginia: see, e.g., *In Re Eplin*, 132 W. Va. 610, 53 S.E.2d 614 (1949) (trial court has the discretion to permit withdrawal of guilty plea).

¹⁹ "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." FED. R. CRIM. P. 32(d). See, e.g., *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963); *Fogus v. United States*, 34 F.2d 97 (4th Cir. 1929).

²⁰ *United States v. Roland*, 318 F.2d 406, 410 (4th Cir. 1963). (court implied that incompetency to stand trial and understanding fully the nature of the proceeding by the defendant would be sufficient grounds to come within the extraordinary case rule).

²¹ 179 S.E.2d at 732.

surrounding the plea to discern whether the defendant has been misled into pleading guilty. Thus, any facts which would help to show a state of mind which might cause an involuntary plea (*e.g.*, fear, distrust, expectation) are to be considered. Such a test however, is difficult for the reviewing court to administer. It is necessarily vague and open to variations in the interpretation of factual circumstances.

A better understanding of the application of such a test may be achieved by a discussion of the authority cited by the court in *Clancy*. In *United States ex rel. Thurmond v. Mancusi*,²² the accused pleaded guilty to the charge of selling six marijuana cigarettes. After a long prison sentence was handed down by the trial judge, his attorney deserted him. The chief law assistant of the county court subsequently informed him that there was nothing more that could be done. The defendant asserted, in petition for a writ of habeas corpus, that the guilty plea was induced by a promise from his counsel that he would not go to prison. There was enclosed an uncontested statement by the defendant that his counsel told him that he would not go to prison. The defendant had also overheard the assistant prosecuting attorney relate to defense counsel that he would ask for the maximum penalty if the defendant did not plead guilty. Following discussion on the effect of the threat, the court held that an involuntary plea would result if induced by a "coercive" promise or threat.²³

Another leading case on subjective inquiry discussed by the court in *Clancy* is that of *United States ex rel. Elksnis v. Gilligan*.²⁴ In *Elksnis*, the trial judge promised the defendant a sentence of no more than ten years in prison, but withdrew this promise at the time for sentencing. The court expressly found that the judge's promise had created an unfair influence on the defendant even without the use of subjective testimony.²⁵ Certainly a judge should not involve himself in the bargaining process, either directly or indirectly.²⁶ Subjective inquiry was not necessary to the decision in this case.

²² 275 F. Supp. 508 (E.D.N.Y. 1967).

²³ *Id.* at 516.

²⁴ 256 F. Supp. 244 (S.D.N.Y. 1966).

²⁵ *Id.* at 253.

²⁶ "In view of the concepts of impartiality and fairness which have traditionally guided the exercise of the judicial function, it is submitted that encouragement of guilty pleas by sentencing concessions is more censurable when practiced by courts than by prosecutors." Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 220 (1956) (footnotes omitted); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969) (trial judge should not participate in bargaining process).

The court also cited *United States ex rel. McCant v. Brierly*.²⁷ In this case the defendant's plea was held to be involuntary. There was no inquiry by the trial judge as to whether the defendant understood the plea, whether a plea agreement had been made, or if the defendant understood the consequences of his plea (the defendant had a third-grade education). Confusion also existed as to the nature of the plea agreement reached between the defense counsel and the district attorney. The plea of guilty was entered only twenty minutes after a plea of not guilty had been given. Considering all of these circumstances, it is easy to see that substantial doubt existed as to the voluntariness of the plea.

The subjective test (totality of circumstances) for the voluntariness of a guilty plea can be seen to involve the interplay of different circumstances upon the defendant's state of mind reflected in the choice of his plea. In *Thurmond*, *Elksnis*, and *McCant* this involuntariness of action was affirmatively shown by a clear preponderance of the circumstances leading up to the defendant's plea.

In *Clancy*, the prosecuting attorney made no threats. By affidavit of the defense attorney for Clancy, the plea agreement was a guilty plea to the first count, possession for sale of marijuana, in the indictment, in return for dropping the second count, sale of marijuana. The prosecutor would also recommend probation to the judge and not resist probation²⁸ (it is incongruous that one would promise to recommend probation, and at the same time promise not to resist probation). Although Clancy's attorneys believed the granting of probation was "relatively positive" they admitted in their affidavits that the prosecutor could not *guarantee* probation.²⁹ Nonetheless, the court deemed the plea involuntary, finding that the prosecuting attorney had promised to recommend probation to the judge for defendant Clancy and did not fulfill that promise. This would be grounds for withdrawal of the plea even without a subjective determination of its impact upon the defendant.³⁰ But in the case of defendant Stern, no such promise appeared in the record.

²⁷ 304 F. Supp. 651 (E.D. Pa. 1969).

²⁸ 179 S.E.2d at 727.

²⁹ *Id.* at 729.

³⁰ *Hamrick v. Boles*, 229 F. Supp. 570, 572 (N.D. W. Va. 1964). "Prosecutor promises to make a recommendation to the court as to sentence, but fails to do so. The plea should be set aside as involuntary because induced by trickery." 8 J. MOORE, *FEDERAL PRACTICE* ¶ 11.05 [4] (3) (2d ed. 1970).

The record showed that he did not plead to one count, but to both.³¹ The trial judge not only read both counts of the indictment, but also questioned the defendant concerning the charges.³² An attorney, by affidavit, related a conversation between counsel and defendant in which the defendant stated that he knew that probation was not guaranteed.³³ Again, this plea was considered involuntary by the court.

The Supreme Court did not seem to go this far in *Brady v. United States*.³⁴ The defendant need not correctly assess every relevant detail concerning his plea.³⁵ Nor is the plea invalid when the defendant decides to accept a probability.³⁶ Even *Thurmond*³⁷ required that the state of a man's mind (subjective test) be determined on the basis of reasonable inferences from known facts and circumstances.³⁸

The leading test concerning the validity of guilty pleas which contains both objective and subjective determinations is that written by Judge Tuttle, dissenting in *Shelton v. United States*.³⁹ Judge Tuttle stated that if a defendant is aware of the consequences of his guilty plea (e.g., different possibilities of sentencing available) and knows the value of any promises made to him (e.g., that a probability is not a guarantee), then his plea is voluntary unless improperly induced by trickery, threat, or falsity.⁴⁰ All of these items could be discerned in a candid inquiry by the trial judge.

³¹ Record, Transcript of Proceedings of October 27, 1969, 40-41, *State v. Stern*, joined on appeal and cited as *State ex rel. Clancy v. Coiner*, 179 S.E.2d 726 (W. Va. 1971).

³² *Id.* Record at 42-45.

³³ 179 S.E.2d at 731.

³⁴ 397 U.S. 742 (1970).

³⁵ "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757.

³⁶ *Id.* at 751.

³⁷ *United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508 (E.D. N.Y. 1967).

³⁸ *Id.* at 518.

³⁹ 242 F.2d 101 (5th Cir. 1957).

⁴⁰ The complete text of Judge Tuttle's test is as follows:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Id. at 115. Judge Tuttle's test received the approval of the court in *Shelton v. United States*, 246 F.2d 571, 572, n. 2 (5th Cir. 1957) (*en banc*), *rev'd on*

Testimony in both cases in *Clancy* demonstrated that neither defendant felt that probation was guaranteed.⁴¹ It has been held that to create an intelligent plea it is not required that all advice given by a defense attorney withstand inspection at a subsequent hearing.⁴² Nor is a defendant entitled to withdraw a plea because of an expectation of leniency which was unfulfilled, unless it was improperly induced by the prosecution.⁴³ Also, the defendant need not be informed of the exact sentence which is to be imposed.⁴⁴

The apparent conflict in fact determination between the court in *Clancy* and other cases using a subjective test must be resolved by the difference in the burden of proof required. In *Clancy* the only burden which the defendant had to meet was that of creating a "sufficient doubt" as to the voluntariness of the plea.⁴⁵ Thus, even though the facts in defendant Stern's case did not appear to create an involuntary plea, they were questionable enough to create a sufficient doubt as to whether it was a completely voluntary plea.

The court would seem to have put itself in a rather difficult position. In this type of situation it is attempting to make a factual determination solely through the use of affidavits and trial transcript. It would be hard to decide what the state of a man's mind was without having heard his testimony and observing his demeanor. It would seem more appropriate if the court could develop a procedure whereby a case could be remanded for a complete hearing on the issue of voluntariness. A special judge could be appointed from an

confession of error on other grounds, 356 U.S. 26 (1958). This test was approved by the Supreme Court in *Brady v. United States*, 397 U.S. 742, 755 (1970).

⁴¹ 179 S.E.2d at 729, 731. In the case of defendant Clancy, his counsel stated in an affidavit that they had cautioned Clancy that they could not guarantee probation. Defendant Stern stated, in the presence of his counsel and a visiting attorney, that he was told that probation was not guaranteed. This statement is contained in an affidavit by the visiting attorney.

⁴² "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970).

⁴³ *United States v. Chinn*, 74 F. Supp. 189, 191 (S.D. W. Va. 1947). In another case, the court would not allow withdrawal of the guilty plea where the defendant had received a longer sentence than he believed he would receive. *Commonwealth v. Culbreath*, 439 Pa. 21, 264 A.2d 643 (1970).

⁴⁴ *State ex rel. Post v. Boles*, 147 W.Va. 26, 36, 124 S.E.2d 697, 702 (1962).

⁴⁵ 179 S.E.2d at 731.

adjoining circuit and could hear testimony on the issue. In this manner the parties would be before the court and a more complete and thorough inquiry could be achieved.

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Criminal Law—Vicarious Liability—Robber Convicted of Murder when Robbery Victim Killed Accomplice

Daniels and Smith entered a liquor store to commit a robbery. While holding the managers, Mr. and Mrs. West, at gunpoint, they repeatedly threatened to kill them if they did not cooperate. Mrs. West drew a pistol and shot Smith, who later died from his wounds. Taylor, a third accomplice waiting outside in the getaway car, was arrested and charged with both robbery and the murder of Smith. A motion to set aside the murder indictment was denied and Taylor appealed. *Held*: Affirmed. Although the petitioner could not be convicted under the felony-murder rule, he could be found guilty of murder under the theory of vicarious liability. *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

The court recognized the rule of *People v. Washington*,¹ that a felon could not be held liable under the felony-murder rule for a killing committed by the victim. However, petitioner's liability was predicated on a theory enunciated in *Washington* and *People v. Gilbert*² that one may be held vicariously responsible for a killing committed by another where the defendant or his accomplice intended to kill, or with a conscious disregard for life committed acts likely to result in death. *Washington* and *Gilbert* both noted that where defendants initiate gun battles, such initiation would constitute an act done in total disregard of life and likely to result in death. The majority in *Taylor* found that pointing the gun at the victims and threatening lethal force if the victims did not cooperate "was sufficiently provocative of lethal resistance to lead a man of ordinary caution and prudence to conclude that Daniels and Smith 'initiated' the gun battle, or that such conduct was done with conscious disregard for human life and with natural consequences dangerous to life."³

¹ 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

² 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

³ *Taylor v. Superior Court*, 3 Cal. 3d 578, 584, 477 P.2d 131, 135, 91 Cal. Rptr. 275, 279 (1970).